Petition for writ of mandate filed 4/2/98. Writ denied 1/2/99.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

RONALD J. CASADO

From rejection during probationary	)	Case No. 96-4428
period, constructive medical termination	)	Case No. 96-4368
and discrimination complaint from the	)	Case No. 96-3945
position of Correctional Officer at Mule	)	
Creek State Prison, Department of	)	BOARD DECISION
Corrections at Ione	)	(Precedential)
	)	NO. 98-01
	)	
	)	January 5-6, 1998

APPEARANCES: Annette DeAndreis, Staff Legal Counsel, on behalf of appellant, Ronald J. Casado; Susan Sandoval, Staff Counsel, Department of Corrections on behalf of respondent, Department of Corrections.

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; Alice Stoner, Ron Alvarado and Richard Carpenter, Members.

DECISION

Appellant, Ronald J. Casado, was rejected during probation after a foot injury rendered him unable to perform his duties as a correctional officer. Appellant claims that the decision to reject him constituted unlawful discrimination under both state and federal law. In this decision, the Board finds that appellant did not establish that he has a “disability” as that term is defined under state and federal antidiscrimination statutes, and thus cannot establish that he was rejected for reasons constituting prohibited discrimination. In addition, the Board concludes that the Department was not obligated to utilize the medical reassignment provisions under Government Code section 19253.5 instead of rejecting appellant during probation. Therefore, the Board sustains the rejection during probation, dismisses the discrimination complaint, and finds no constructive medical termination.

BACKGROUND

The Board adopts the substance of the factual findings of the Administrative Law Judge (ALJ) as set forth below.

The Department served appellant with a Notice of Rejection during Probationary Period (NOR) by mail on November 6, 1996. On November 18, 1996, appellant's representative appealed the NOR to the Board. On December 9, 1996, appellant's representative filed an "AMENDED appeal from Constructive Medical Termination and Discrimination by Ronald J. Casado." The amended appeal stated that it was amending the appeal of the NOR that was filed on behalf of appellant on November 18 and that "the facts indicate that Officer Casado was subjected to a constructive medical termination as well as unlawful discrimination."

After receiving the amended appeal, the SPB Appeals Division opened two new files, one for the constructive medical termination (SPB Case No. 96-4368) and the other for the discrimination complaint (SPB Case No. 96-3945). At hearing, appellant asserted that the December 9 amended appeal was a separate appeal from constructive medical termination, an affirmative defense to the NOR, and a separate discrimination complaint.

The ALJ dismissed both SPB Case Nos. 96-4368 and 96-3945 on the ground that appellant's amended appeal plead only affirmative defenses and not separate appeals. The ALJ also found that if the amended appeal were to represent a separate appeal of a constructive medical termination, it was an untimely appeal pursuant to Government Code section 19253.5 (f), as appellant was on notice of the medical nature of the action as of the date of the service of the NOR. In regards to the discrimination

complaint, the ALJ found that appellant did not file a separate discrimination complaint in compliance with Government Code section 19702(g).

The parties stipulated to the truth of the following:

1) Appellant began as a cadet with the Correctional Training Center (Academy) on November 5, 1994.

2) Appellant reported to Mule Creek State Prison (MCSP) as a Permanent Intermittent Correctional Officer on December 19, 1994.

3) On some[1] date after the 19th of December 1994, appellant reported to a supervisor that he was suffering from pain in his foot and requested special accommodation.

4) As a result of foot problems, appellant was unavailable for work from January 23, 1995 through March 1, 1995.

5) Appellant worked 159.5 hours as a permanent intermittent Correctional Officer in the month of March 1995. Appellant worked 180 hours as a permanent intermittent Correctional Officer in the month of April 1995. Appellant worked 167 hours as a permanent intermittent Correctional Officer in the month of May 1995.

6) Appellant was unavailable to work in all of June 1995.

7) Appellant worked 134 hours as a permanent intermittent Correctional Officer in the month of July 1995.

8) As a result of appellant's foot problems, he was unavailable for work from August 1, 1995 through December 31, 1995.

9) Appellant reported for duty as a permanent intermittent Correctional Officer on January 1, 1996. Appellant worked 93 hours as a permanent intermittent Correctional Officer from January 1 through 17, 1996.

10) Appellant has not been able to return to work as a permanent intermittent Correctional Officer from January 17,1996 to the date of the hearing (February 28, 1997).

11) On August 27, 1996, appellant was evaluated by A. James Smalley, D.P.M. Dr. Smalley stated in his report that based on appellant's current medical condition, he would not be able to return to his position as a Correctional Officer.

At the time of hearing before the ALJ, appellant was a sixty-year-old man. While engaged in training exercises at the correctional academy, he slipped while running downstairs. The steps were slippery due to rain, and appellant injured his right foot. Appellant thought he only had a sprained ankle at the time and did not report the injury. He graduated from the academy on December 15, 1994.

Appellant reported to MCSP on December 19, 1994, but was unable to maintain a consistent work history because of his injured foot. Eventually, appellant was referred to Dr. Kittiyama, an orthopedic surgeon. After examining appellant, Dr. Kittiyama informed appellant that he had a ruptured posterior tendon in his right foot. After appellant explained to Dr. Kittiyama how he sustained the injury, Dr. Kittiyama, advised appellant to report the injury as an industrial injury through the workers compensation system. Appellant delayed reporting the injury because he hoped that he would heal.

Ultimately, appellant's right foot was operated on by Dr. Gilbert Wright, an orthopedist, on August 21, 1995. Appellant returned to work on January 1, 1996, but

his foot would not respond properly and he left work on January 17, 1996. He never returned to work to perform correctional officer duties again.

Beginning in early February 1996, appellant requested that the Department accommodate his medical condition. While the parties dispute whether appellant actually requested "reasonable accommodation" or filed a specific form with the Department, the record clearly reflects that appellant advised the Department on numerous occasions that he was unable to stand for prolonged periods of time, and requested either a correctional officer position that did not require prolonged standing or reassignment to another position within the Department.

Ultimately, the Department referred appellant to the Department's Early Intervention Program. Appellant completed a Request for Reasonable Accommodation form provided by the Department's Early Intervention Counselor and sent it to the personnel office, but did not keep a copy for himself.

Appellant testified that he could not stand for prolonged periods of time. On August 27, 1996, A. James Smalley, D.P.M., conducted an evaluation of appellant's medical condition.[1] In his evaluation, Dr. Smalley stated the following work restrictions:

> ...Now he needs to rest for approximately 10-15 minutes after 2 hours being on his feet. He should not be asked to walk on uneven ground or to climb stairs. In my opinion, he should be allowed to sit as needed. He should not carry weights greater than 50 pounds for distances exceeding of 20 feet on a frequent basis. ...This is a disability precluding very heavy work and contemplates the individual has lost approximately one-quarter of his pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling and climbing or other activities involving comparable physical effort.

[1] Dr. Smalley conducted this evaluation as an Agreed Medical Examiner in appellant's workers' compensation proceeding.

On October 15, 1996, appellant began vocational rehabilitation. Appellant's Vocational Rehabilitation Counselor contacted the Academy's return-to-work coordinator and informed her that appellant was interested in obtaining another state job. Appellant completed some steps to seeking alternate employment as assigned by the counselor, but was served with his NOR on November 6, 1996.

On June 12, 1997, appellant applied for disability retirement with the Public Employees Retirement System (PERS)

Appellant introduced evidence that, in October 1994, another probationary employee, Alfred Soria, was reassigned to an office assistant position after he sustained an industrial injury at the correctional academy.

The Department's Operations Manual (DOM) section 31010.9.1 states:

> The Department shall make reasonable accommodations to the known physical or mental limitations of qualified disabled applicants and employees, including persons who become disabled while employed with the Department. Alternate job placement shall be included within the scope of reasonable accommodation and, in most cases, can be accomplished within the employee's geographical work location.
>
> All employees who incur disabling injuries or illness and wish to remain employed shall be provided with reasonable accommodation. This includes the necessary assistance and appropriate employment options to remain productive state employees. Alternative job placement will also be provided when appropriate and if a transfer is necessary, contacts with prospective hiring authorities shall be the responsibility of the local Reasonable Accommodation Coordinator (RAC) (who is usually the AA Coordinator).

Several witnesses testified to the effect that requests for reasonable accommodation are reviewed by the Department on a case by case basis and that probationary employees were not precluded from being considered for reasonable accommodation in the form of alternative job placement.

DISCUSSION

A probationary employee may be rejected during the probationary period "for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility," but may not be rejected for reasons constituting prohibited discrimination under Government Code sections 19700 to 19703, inclusive.[2] The Board may restore a rejected probationer to the position from which he or she was rejected only if it determines, after hearing, that there is no substantial evidence to support the reason or reasons for rejection, or that the rejection was made in fraud or bad faith.[3] Unlike in adverse action cases, where the burden of proof is on the employer, in rejection cases, the burden of proof is on the rejected probationer to establish grounds for invalidating the rejection: subject to rebuttal, it is presumed that the rejection is free from fraud and bad faith and that the statement of reasons contained in the notice of rejection is true.[4]

Appellant alleges that the Department's decision to reject him during probation because of his foot condition constituted unlawful discrimination on the basis of disability, which is prohibited by Government Code section 19702(a), as well as by the California Fair Employment and Housing Act (FEHA)[5] and the federal Americans with Disabilities Act (ADA)[6]. We must first determine, therefore, whether appellant's medical

[2] Govt. Code § 19173.
[3] Govt. Code § 19175(d).
[4] Id.
[5] Govt. Code § 12940
[6] 42 U.S.C. §§ 12101 et seq.

constitutes a "disability" under these laws. Since the definition of "disability" under section 19702 parallels the ADA[7], we turn to the ADA for guidance.

Appellant Has Not Established That He is "Disabled" Within the Meaning of the ADA or the FEHA

Under the ADA, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[8] "Major life activities" include such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[9] In addition, the Equal Employment Opportunity Commission (EEOC), in "Interpretive Guidance" promulgated as an appendix to its regulations, has stated that sitting, standing, lifting and reaching are also major life activities.[10]

To qualify as "disability" under the ADA, however, an impairment must "substantially limit" the performance of a major life activity. "Substantially limit" means that the individual is either:

> Unable to perform a major life activity that the average person in the general population can perform; or
>
> Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[11]

[7] See, e.g., Govt. Code § 19702(d) (The definitions of physical and mental disability shall not be deemed to refer to or include conditions excluded from the federal definition of "disability" pursuant to the ADA).
[8] 42 U.S.C. § 12102(2)(A); 29 C.F.R § 1630.2(g)(1). The definition also includes being "regarded as" or having a "record of" a disability.
[9] 29 C.F.R. § 1630.2(i).
[10] 29 C.F.R. § 1630.2(i), Appendix III.
[11] 29 C.F.R. § 1630.2(j)(1).

Factors considered in determining whether an individual is substantially limited in a major life activity include the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long term impact of or resulting from the impairment.[12] Several court decisions have concluded that an individual who walks slowly or with moderate difficulty, but who is able to walk without assistance, is not substantially limited in the major life activity of walking. For example, in Kelly v. Drexel University,[13] the court concluded that, "as a matter of law," an employee whose hip injury caused him joint pain and difficulty walking, and required him to move slowly and hold the handrail when climbing stairs, was not substantially limited in his ability to walk.[14]

In this case, appellant has not established that he is substantially limited in the major life activities of walking and standing. According to the medical report, he is able to remain on his feet for up to two hours, so long as he can rest for 10-15 minutes afterwards. There is no evidence in the record that appellant requires any sort of physical assistive devices, such as a cane, to stand, walk or climb stairs. Although the medical report indicates that appellant should not climb stairs, there is no evidence that he cannot do so or is substantially limited in doing so. Indeed, courts have said that

[12] 29 C.F.R. § 1630.2(j)(2).
[13] (3d Cir. 1996) 94 F.3d 102.
[14] See also Penchisen v. Stroh Brewing Co. (E.D. Pa. 1996) 932 F.Supp. 671, aff'd, 116 F.3d 469 (3d Cir. 1997), cert. denied, 118 S.Ct. 178 (1997) (individual who walked and climbed stairs slowly because of a metal plate in her ankle was not substantially limited in a major life activity); Stone v. Entergy Services, Inc. (E.D. La. 1995) (unpublished) 4 AD Cases 1112 (individual with 15 % total body disability due to mild post-polio syndrome resulting in muscle weakness, partial paralysis, limited endurance, and difficulty climbing and descending stairs, but who did not require the use of braces, canes, crutches or a wheelchair, was not substantially limited in his ability to walk); Penny v. United Parcel Service (6th Cir. 1997) 128 F.3d 408 (moderate difficulty or pain experienced when walking and difficulty climbing stairs does not rise to level of disability).

climbing is not a major life activity under the ADA.[15] According to appellant's testimony, his primary physical restriction is that he cannot stand "all day," and needs to sit down "on occasion." While appellant may be somewhat impaired in his ability to stand or walk, the evidence does not establish that his impairment imposes a substantial limitation on his ability to perform these activities, and thus does not rise to the level of a disability protected under the ADA.

Appellant likewise has not established that he is substantially limited in the major life activity of working. Under the ADA, an individual is not considered to be substantially limited in working if he or she is only restricted from performing a single particular job.[16] Rather" "the impairment must prevent the [individual] from performing an entire class or broad range of jobs as compared to the average person possessing comparable training, skills, and abilities."[17] For example, courts have held that persons whose medical conditions disqualified them from working as a firefighter or a police officer for a particular employer are not substantially limited in working.[18] Where an

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[15] See, e.g., Rogers v. International Marine Terminals, Inc. (5th Cir. 1996) 87 F.3d 755, 758, n. 2 (climbing is not such a basic, necessary function to qualify as a major life activity; 13% permanent partial disability due to ankle condition does not establish a substantial limitation on a major life activity); Robinson v. Global Marine Drilling Co. (5th Cir. 1996) 101 F.3d 35, 37.

[16] 29 C.F.R. § 1630.2(j)(3) and Appendix; see, e.g., Sutton v. United Air Lines (10th Cir. 1997) ___ F.3d ___, 1997 WL 732520 (individuals disqualified from employment as pilots for a single employer due to uncorrected vision of 20/100 or worse are not substantially limited in the major life activity of working in a broad class of jobs utilizing similar training, knowledge, skills or abilities).

[17] 29 C.F.R. § 1630.2(j)(3(i); Aucutt v. Six Flags Over Mid-America, Inc. (8th Cir. 1996) 85 F.3d 1311, 1319; Snow v. Ridgeview Medical Center (8th Cir. 1997) 128 F.3d 1201.

[18] See, e.g., Daley v. Koch (2d Cir. 1989) 892 F.2d 212 ("being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity); Pilarski v. City of Chicago (unpublished) (N.D. Ill. 1997) 1997 WL 83298 (probationary police officer terminated due to knee condition did not establish that employer perceived her as unable to perform a large class of jobs or law enforcement work in particular); Bridges v. City of Bossier (5th Cir. 1996) 92 F.3d 329, 334,cert. denied, 117 S.Ct. 770 (1997) (city that disqualified individual with mild form of hemophilia from firefighter position involving routine exposure to extreme trauma did not regard him as substantially limited in a broad range of jobs); Smith v. City of Des Moines (8th Cir. 1996) 99 F.3d 1466, reh'g denied (1997) (disqualification of applicant for firefighter position due to his inability to pass physical fitness test required for approval to wear self-contained breathing apparatus did not establish employer regarded individual as disabled from performing broad class of jobs.)

individual is qualified for and able to perform a wide variety of other positions, courts have found no disability.[19] Thus, in one case under analogous state law, the court held that an individual whose impairments rendered him unable to meet a county's vision and hearing standards required for the position of detention deputy was not substantially limited in working, where his impairments would not disqualify him from other positions in the law enforcement field, such as parole or probation officer.[20] Under the ADA, the plaintiff bears the burden of proving a substantial limitation on the major life activity of working.[21]

In this case, other than the report of the Agreed Medical Examiner stating appellant's work restrictions, appellant has presented no evidence that he is precluded from working in a broad range or class of jobs, either generally or within the law enforcement field. To the contrary, appellant presented substantial evidence and argument to support his position that he is able to perform a wide range of jobs within the Department. Therefore, we conclude that appellant has not demonstrated that he is substantially limited in the major life activity of working.

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[19] See, e.g., Price v. Marathon Cheese Corp. (5th Cir. 1977) 119 F.3d 330 (cheese plant employee with carpal tunnel syndrome was not substantially limited in working, where she could perform her job with accommodation, and believed she was able to perform other jobs for the employer); McKay v. Toyota Motor Manufacturing USA (E.D. Ky. 1995) 878 F.Supp. 1012, 1015, aff'd, 110 F.3d 369 (6th Cir. 1997) (inability of automobile assembly worker with carpal tunnel syndrome to perform repetitive factory work did not substantially limit her ability to perform a broad range of jobs in various classes) ; Marschand v. Norfolk & Western Railway Co. (N.D. Ind. 1995) 876 F.Supp. 1528, aff'd, 81 F.3d 714 (7th Cir. 1996) (post-traumatic stress syndrome limiting railroad employee from working around trains did not limit his ability to perform a substantial number of other jobs in a variety of fields; evidence showed employee applied for employment with at least 16 prospective employers in other fields.)

[20] State of Minnesota v. Hennepin County (Minn. 1989) 441 N.W.2d 106, 51 EPD ¶ 39,383.

[21] Aucutt v. Six Flags, supra, at 1318-1319.

In order to maintain a claim of disability discrimination, appellant must first establish that he is an individual with a disability. Having failed to do so, appellant's claim that the Department rejected him during probation for reasons constituting prohibited discrimination on the basis of disability is denied.

The Department Was Entitled to Elect Rejection During Probation Instead of Medical Reassignment

Having determined that appellant is not "disabled," and thus cannot prevail on his argument that he was rejected for reasons constituting prohibited discrimination on the basis of disability, we turn next to the question of whether the Department was entitled to reject appellant during probation on the basis of his medical condition, rather than utilize the procedures set forth in Government Code section 19253.5. We conclude that Kuhn v. Department of General Services[22] is controlling on this issue and that the Department could elect to reject appellant during probation.

The interplay between the "medical termination" statute, section 19253.5, and section 19173, governing rejections during probation, was addressed by the court of appeal in Kuhn v. Department of General Services. In Kuhn, a mentally ill bookbinder began making threats of violence against his supervisor. The department ordered him to submit to a medical evaluation under Government code section 19253.5(a). After the evaluation concluded that he was unfit for any position in the agency, the department medically terminated him under Government Code section 19253.5(d). Subsequently, after a determination that Kuhn's illness was in stable remission, Kuhn sought and

[22] (1994) 22 Cal.App.4th 1627.

obtained reinstatement, but was required to serve a new probationary period, pursuant to Government Code section 19253.5(h).[23]

Following his reinstatement, the department rejected Kuhn during his new probationary period due to performance problems and excessive absenteeism. Kuhn appealed the rejection, arguing that the department acted in bad faith in rejecting him during probation, rather than utilizing the medically termination process again, under which he would have retained reinstatement rights. The Board agreed, and revoked the rejection and awarded back pay.

On appeal, the court of appeal held that the Board erred in concluding that a reinstated probationer's medically related inability to satisfy job requirements *must* be processed as a medical termination, with a right of reinstatement, rather than a run-of-the-mill failure on probation.[24] Since section 19253.5(h) permits an appointing authority to condition reinstatement following a medical termination upon service of a new probationary period, the court reasoned, "[t]here could be no purpose in providing for a new probationary period other than to allow the appointing power to permanently separate the employee if it so chose."[25] Furthermore, the court noted, this rule is consistent with Government Code section 19175.1, which permits the Board, upon written request and a medical examination, to restore the name of an employee who

[23] Section 19253.5, subdivision (h), provides, in relevant part: "Upon the request of an appointing authority or the petition of the employee who was terminated, demoted, or transferred in accordance with this section, the employee shall be reinstated to an appropriate vacant position in the same class[,] in a comparable class[,] or in a lower related class if it determined by the [B]oard that the employee is no longer incapacitated for duty. ...In approving or ordering such reinstatements, the [B]oard may require the satisfactory completion of a new probationary period. ..."

[24] 22 Cal.App.4th at 1638.

[25] Id. at 1639.

has been rejected during probation solely for medical reasons to the employment list from which his or her name originally was certified.[26] Thus, the court concluded, "were there indeed some legislative intent to treat all medically based incapacities as temporary separations from the civil service, there would be no reasons to provide for this situation."[27] In a footnote, the court emphasized that the significance of section 19175.1 "lies in the fact that the Legislature contemplated that there *can* be probationary employees rejected solely on a medical basis, thus obviously implying that not all medically impaired probationers must be given reinstatement rights pursuant to section 19253.5."[28]

Having found no prohibited discrimination, we conclude that the Department did not act in bad faith in rejecting appellant during probation due to his medical inability to perform the job of correctional officer. Although Kuhn involved the rejection of a probationary employee due to poor performance after the department had already medically reassigned him pursuant to section 19253.5, this factual difference does not warrant a contrary result. As noted by the court in Kuhn, Government Code section 19175.1 expressly contemplates the situation where a probationary employee is rejected for medical reasons, and permits the Board to restore such an individual to the employment list from which he or she was originally certified, upon a determination that the individual meets the required medical standards. Under Kuhn, the Department is

[26] 22 Cal.App.3d at 1639.
[27] Id. at 1639-1640.
[28] Id. at 1640, note 9.

entitled to elect either rejection during probation or to proceed under section 19253.5, but is not required to utilize the latter.

Finally, we consider whether the Department's action constituted a "constructive medical termination." The Board has previously held that an appointing power engages in a "constructive medical termination" when, for asserted medical reasons, it "refuses to allow an employee to work, but has not served the employee with a formal notice of medical termination, and the employee challenges the appointing power's refusal to allow the employee to work under circumstances where the employee asserts that he or she is ready, willing, and able to work and has a legal right to work."[29] In this case, appellant admits that he is not ready, willing and able to work in his appointed position of correctional officer, but asserts that he is ready, willing and able to work in other positions within the department. In light of our conclusions that the rejection was not taken for reasons constituting prohibited discrimination, nor in bad faith, we conclude that a probationary employee who is unable to perform the duties of his appointed position and is rejected during probation for medical reasons cannot state a claim for constructive medical termination, absent a showing of discrimination. Such an employee is not ready, willing and able to perform his appointed position, and does not have a legal right to work once a notice of rejection during probation has been served in accordance with Government Code section 19173. Therefore, the appointing power

[29] Carole Mason (1993) SPB Dec. No. 93-08, at p. 6.

may lawfully reject an employee during probation for medical reasons, so long as it does not discriminate on the basis of disability.[30]

Our ultimate disposition in this type of case depends on whether or not an employee is "disabled" within the meaning of the ADA. If an employee's medical condition rises to the level of a "disability" under the ADA, he may not be rejected during probation on the basis of that disability, but instead is entitled to reasonable accommodation, which may, in appropriate circumstances, include reassignment to a vacant position.[31] On the other hand, if a probationary employee's medical condition does not qualify as a "disability," neither state nor federal law requires reasonable accommodation.[32] Thus, while an appointing power may utilize the procedures set forth in Government Code section 19253.5 with respect to a probationary employee who is medically unable to perform the duties of his or her position, it is not required to do so, and may instead reject the employee during probation. As noted by the court in Kuhn, an employee rejected during probation for medical reasons may request the Board to restore his or her name to the employment list from which he or she was originally hired, upon a showing of ability to meet the medical requirements.

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[30] For purposes of this decision, we conclude that appellant's appeal from constructive medical termination was timely. Since the Department never served appellant with a notice of medical termination under section 19253.5, the 15-day limitation period applicable to medical termination appeals does not apply. Appellant's amended appeal from rejection during probation, in which he raised the issue of constructive medical termination, was sufficient to establish jurisdiction over this appeal.

[31] Under the ADA, reasonable accommodation in the form of reassignment to a vacant position is available to all disabled employees who cannot be accommodated in their original positions. (Gerardo Manriquez (1997) SPB Dec. No. 97-05, p. 13; 42 U.S.C. § 12111(9), 29 C.F.R. § 1630.2(o)(2).) Nothing in the ADA excludes probationary employees from the definition of "employee." Therefore, probationary employees with disabilities are entitled to reasonable accommodation to the same extent as all other current employees.

[32] In reaching this conclusion, we do not address what reasonable accommodation rights, if any, may accrue, to a nonprobationary current employee whose impairment does not rise to the level of a disability under the ADA.

CONCLUSION

We conclude that the Department was not required to utilize the medical termination/reassignment procedures of section 19253.5, rather than rejection during probation pursuant to section 19173, in this case. While section 19173 does not permit an appointing power to terminate a probationary employee with a covered disability on the basis of that disability, an appointing power has the discretion to choose between rejection during probation and the procedures contained in section 19253.5 with respect to an employee who is medically unable to perform the functions of his or her position due to an impairment that does not constitute a disability.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

The appeals of Ronald J. Casado from rejection during probation, constructive medical termination, and discrimination are hereby denied;

This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD[33]

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member

* * * * *

[33] *Member Alice Stoner did not take part in this decision.

(Casado continued - Page 18)

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 5-6, 1998.

_____
Walter Vaughn
Acting Executive Officer
State Personnel Board

on review of the transcript, the Board corrects the stipulation of facts to conform to the record.